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 Jennifer Nash, and Brian Williams*

**UNITED STATES DISTRICT COURT
 DISTRICT OF NEVADA**

SHANNON CARTER,
 Plaintiff,

v.

S. BEAN, BITAR, and J. NASH, *et al.*,
 Defendants.

Case No. 2:17-cv-01628-RFB-EJY

**NOTICE OF APPEAL OF ORDER
 GRANTING IN PART AND DENYING
 IN PART DEFENDANTS' MOTION
 FOR SUMMARY JUDGMENT
 [ECF No. 87]**

Defendants, Scherrie Bean, Paul Bitar, Alberto Buencamino, James Dzurenda, Jerry Howell, Jennifer Nash, and Brian Williams, by and through counsel, Aaron D. Ford, Attorney General for the State of Nevada, and Wade J. VanSickle, Deputy Attorney General, pursuant to FED. R. APP. P. 3(a)(1), FED. R. APP. P. 4(a) & 4(a)(1)(A), 9th CIR. R. 3–6 and 28 U.S.C. § 1291, hereby appeal to the United States Court of Appeals for the Ninth Circuit from this Court's December 1, 2020, Order granting in part and denying in part Defendants' Motion for Summary Judgment (ECF No. 87). Because this Notice of Appeal is being filed within thirty (30) days of the Order, this appeal has been timely brought.

It is noted that at the time of filing this Notice of Appeal, there is a pending motion for reconsideration (ECF No. 88) filed on December 14, 2020. While it is possible that the motion for reconsideration may extend the time for filing this Notice of Appeal, *see* FED. R. APP. P. 4(a)(4)(A)(iv)&(vi), because that motion for reconsideration does not address

qualified immunity, out of an abundance of caution and to ensure that the Notice is timely filed, this Notice of Appeal is being filed today, which is seventeen (17) days following the December 1, 2020 order. Defendants seek the Court of Appeals to seek review of, and respectfully reverse should this Court not grant the currently pending motion for reconsideration. To the extent the pending motion for reconsideration does stay the time for filing this appeal, Defendants note that the Notice of Appeal “become effective . . . when the order disposing of the [motion for reconsideration] is entered.” FED. R. APP. P. 4(a)(4)(B)(i). This Notice of Appeal is being brought pursuant to Fed. R. App. P. 3 & 4 and 28 U.S.C. § 1291, and *Mitchell v. Forsyth*, 472 U.S. 511, 526-27 (1985). Specifically, the Defendants appeal the District Court’s denial of qualified immunity in denying the motion for summary judgment.¹

Specifically, the Appeal will be addressing whether Defendants Bean and Bitar are entitled to qualified immunity on Plaintiff’s Eighth or First Amendment claim.²

In the Ninth Circuit, where, as here, the interlocutory claim is immediately appealable, its filing divests the district court of jurisdiction to proceed with trial.³ In the context of interlocutory qualified immunity appeals, the district court is automatically divested of jurisdiction to proceed with trial pending appeal.⁴ The NDOC would suggest

¹ See generally *Knox v. Southwest Airlines*, 124 F.3d 1103, 1107 (9th Cir. 1997) (“[W]e have jurisdiction over an interlocutory appeal from the denial of qualified immunity where the appeal focuses on whether the defendants violated a clearly established law given the undisputed facts . . .”).

² See ECF No. 87 at 12-13.

³ *Chuman v. Wright*, 960 F.2d 104 (Ninth Cir. 1992), citing *United States v. Claiborne*, 727 F.2d 842, 850, cert. denied, 469 U.S. 829, 105 S.Ct. 113, 83 L.Ed.2d 56 (1984). To this end, the Sixth, Seventh, and Tenth Circuits have also addressed this issue in the context of interlocutory qualified immunity appeals. *Yates v. City of Cleveland*, 941 F.2d 444 (6th Cir.1991); *Stewart v. Donges*, 915 F.2d 572 (10th Cir.1990); *Apostol v. Gallion*, 870 F.2d 1335 (7th Cir.1989).

⁴ *Chuman* at 105. The only exception for this proposition occurs if the District Court finds that the defendants’ claim of qualified immunity is frivolous or has been waived. The District Court then must certify in writing that the defendants have forfeited the right to a pretrial appeal. *Id.*

1 that the *Chuman v. Wright* jurisprudence would permit the District Court to proceed with
2 disposition of the motion for reconsideration, but not trial or any pre-trial motion practice.

3 The required Representation Statement pursuant to 9th CIR. R. 3–2(b) is attached
4 hereto.

5 Respectfully submitted this 17th day of December, 2020.

6 AARON D. FORD
7 Attorney General

8 By: /s/ Wade J. VanSickle
9 Wade J. VanSickle (Bar No. 13604)
Deputy Attorney General
Attorneys for Defendants

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REPRESENTATION STATEMENT

Pursuant to FED. R. APP. P 12(a) & (b) and 9TH CIR. R. 3–2, Defendants, Scherrie Bean, Paul Bitar, Alberto Buencamino, James Dzurenda, Jerry Howell, Jennifer Nash, and Brian Williams note that the following individuals are the parties and counsel in this matter:

The parties to this action are:

Plaintiff-Appellee Shannon Carter #70773

Pro se

Warm Springs Correctional Center

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Carson City, NV 89702

Defendant Scherrie Bean

Defendant Paul Bitar

Defendant Alberto Buencamino

Defendant James Dzurenda,

Defendant Jerry Howell

Defendant Jennifer Nash

Defendant Brian Williams

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CERTIFICATE OF SERVICE

I certify that I am an employee of the State of Nevada, Office of the Attorney General, and that on December 17, 2020, I electronically filed the foregoing **NOTICE OF APPEAL OF ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**, via this Court's electronic filing system. Parties that are registered with this Court's electronic filing system will be served electronically. For those parties not registered, service was made by emailing a copy to the following:

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Plaintiff, Pro Se

/s/ Sheri Regalado
Sheri Regalado, an employee of the
Office of the Nevada Attorney General